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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/936,672	01/23/2002	Carolyn Cupp	112701-320	9108
29157	7590	12/28/2004	EXAMINER	
BELL, BOYD & LLOYD LLC			HENDRICKS, KEITH D	
P. O. BOX 1135			ART UNIT	PAPER NUMBER
CHICAGO, IL 60690-1135			1761	

DATE MAILED: 12/28/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Applicati n N .

09/936,672

Applicant(s)

CUPP ET AL.

Examiner

Keith Hendricks

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 22 September 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-5,7-11 and 13-34 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-5,7-11,13-25 and 27-34 is/are rejected.
- 7) ☒ Claim(s) 17 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

Priority

It is again noted that this application claims priority to PCT/EP01/00307 and US application 09/483,328. However, as previously stated, the subject matter of claims 21-24, 25-27, 29-30, 32-33 and 35 does not find support in the 09/483,328 application, and thus *the effective priority date for the subject matter of claims 21-35, is January 10, 2001*, the filing date of PCT/EP01/00307.

Claim Objections

Claim 17 is objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form, or rewrite the claim(s) in independent form.

Claim 17, which recites the limitation "wherein the product does not comprise a humectant", clearly conflicts with claim 13, from which it depends. Claim 13 specifically requires the presence of a humectant.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 7-11, 18, 28-29 and 34-35 remain rejected under 35 U.S.C. 102(b) as being anticipated by Gellman et al. (US PAT 4,743,460). The reference and rejection are incorporated as cited in a previous Office action.

Applicant's arguments filed September 22, 2004, have been fully considered but they are not persuasive. At page 7 of the response, applicant states that "apparently, the Patent Office considers

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insoluble fiber as inherent in Gellman." This is correct, and has been clearly and positively addressed and supported on the record.

Regarding the presence of fiber in the composition of Gellman, applicant states that the Office action

misses the point. The pet food of the invention includes insoluble fiber not just fiber. This limitation is present in each of the claims. And again the disclosure in Gellman is only concerned with the addition of starch or starch-like material not with fiber or insoluble fiber. Among other starchy substances, Gellman's preferred farinaceous material is said to be flour (Col. 10, lines 25-26) which can be bleached white flour which is well known to have had the fiber removed. Thus, Gellman fails to disclose insoluble fiber either literally or inherently.

This is not deemed persuasive for the reasons of record. Applicant has apparently misconstrued the reference, and has not appreciated the full teachings of the reference, especially with regard to the passages at column 10. Initially, it is noted that the reference teachings are in no way limited to the use of a pure starch product or flour. The reference specifically states:

As used herein the phrase "farinaceous material" means those grain foodstuffs containing a preponderance of starch or starch-like material. Examples of useful farinaceous grain materials are wheat, corn, oats, rye, barley, milo, rice, other cereal grains and starch from such cereal grains. The useful forms are in particulate form, such as the farinaceous meals or flours obtained upon grinding cereal grains such as corn, oats, wheat, milo, barley, rice and the various milling by-products of the cereal grains, such as wheat feed flour, wheat middlings, wheat mixed feed, wheat shorts, wheat rod dog, oat groats, hominy feed, and any other such material. Also included are protein concentrates farinaceous ingredients such as wheat and corn gluten. Preferably the farinaceous material is wheat and preferably the farinaceous material is used in flour form.

Thus, applicant's comments are misleading and inaccurate.

Also and again, insoluble fiber is not specifically mentioned by name as an ingredient in Gellman et al.; however, the farinaceous materials described at column 10 naturally contain some amount of insoluble fiber. Simply because a sub-component of a composition element is not specifically recited by name, does not in any way mean that it is not present. As previously stated on the record, for example, wheat generally contains 2.3- 5.6% total dietary fiber, with 1.7% of that *insoluble*, including cellulose. Corn flour has 15% *insoluble* fiber, including cellulose (reference to standard textbook in the art, for example, pg. 481, 484. Lorenz et al. "Handbook of Cereal Science and Technology", Dekker Press, 1991). Thus, the referenced products which are taught as containing these components, *necessarily* contain *insoluble* fiber as a result of inclusion of these components. Note that the instantly-rejected claims simply require the *presence* of insoluble fiber, in any amount. Applicant has continued to ignore this evidence, and has not addressed the specific data provided on the record regarding this factor.

At page 7 of the response, applicant states that Gellman does not teach a product with the claimed dimensions, and that "Gellman is silent on these dimensions and therefore provides no suggestion for

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these dimensions as would be required to support an obviousness rejection.” This is not persuasive for the reasons of record, as the claims rejected over Gellman et al. do not recite dimensions, and thus applicant’s point is moot. It is additionally noted that the product of Gellman et al. provides a dry soft canine biscuit which has a preferred thickness of about ½ inch [12.7 mm] (col. 5, line 28), and was cut into 1.25 inch (31.75 mm) length cylinders (col. 13, line 40).

Finally, it is noted that applicant’s initial claims 6, 12 and current claim 17 implied that the invention was to not include a humectant. However, regarding applicant’s new claim amendment to now include a humectant in the dried pet food, it is again noted that the reference teaches the optional use of the humectant.

NOTE: The previous rejections over Hand et al. (US PAT 5,431,927) have been withdrawn due to applicant’s amendment, now stating that the dried pet food must contain a humectant. The previous rejection over Wang is also hereby withdrawn.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-5, 13-17, 19-20, 25 and 31-32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gellman et al. The reference and rejection are incorporated as cited in a previous Office action.

Applicant's arguments filed September 22, 2004, have been fully considered but they are not persuasive. At page 7 of the response, applicant states that Gellman et al. fails to disclose the claimed dimensions of the pet food product. Applicant states that “Gellman is silent on these dimensions and therefore provides no suggestion for these dimensions as would be required to support an obviousness rejection.” This is not deemed persuasive for the reasons of record. Gellman et al. is, in fact, not “silent” with respect to the dimensions of the pet food product disclosed therein. The product of Gellman et al. provides a dry soft canine biscuit which has a preferred thickness of about ½ inch [12.7 mm] (col. 5, line 28), and was cut into 1.25 inch (31.75 mm) length cylinders (col. 13, line 40). As previously stated on

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the record, as the reference stated that the soft particles containing the denatured/gelled protein source and carbohydrate source, etc., were to be incorporated to provide a dry, soft canine biscuit, and that at column 15 the reference stated that the "soft dough and particles were then formed... into various shapes" to create the biscuits, it would have been obvious to one of ordinary skill in the art to have varied the final biscuit dimensions such that they were of a larger size in the common ranges of traditional canine chew products and biscuits. The reference taught that the product had a preferred thickness of about ½ inch [12.7 mm] (col. 5, line 28), and was cut into 1.25 inch (31.75 mm) length cylinders (col. 13, line 40), and thus it would have been obvious to have varied the width of the biscuit in accordance with the other dimensions, especially to form "various shapes" as taught. The slight modification of the dimensions of the pet food product would not have involved an inventive step, and does not impart patentability to the claims, *per se*.

Finally, regarding the use of corn gluten meal as a protein source, it is noted that at column 10, Gellman discloses the inclusion of "farinaceous meals or flours obtained upon grinding cereal grains such as corn, oats, wheat, milo, barley, rice", and that "also included are protein concentrates [of] farinaceous ingredients such as wheat and corn gluten." Thus it would have been obvious to one of ordinary skill in the art to have selected corn gluten meal for inclusion in the pet food product.

Claims 22-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gellman et al., taken as cited above, in view of Schommer et al. The references and rejection are incorporated as cited in a previous Office action.

Schommer et al. disclose a food container for mixing both wet and dry pet foods. At column 1, it is stated that it was known that pets prefer both wet and dry foods, and that "in the past, pet owners have purchased dry pet food and canned wet food in separate containers, and then mixed them to feed their pet." The patent teaches the mixing of dry and wet pet foods. Thus, it would have been obvious to one of ordinary skill in the art to have performed this commonly-known method of pet food mixing, for example with the known food of Gellman et al. The selection of the amount of both dry and wet foods would not have involved an inventive step, and would have been well within the ordinary level of skill in the art to have provided an approximately equal balance of wet food and dry food.

Claims 21, 24, 27, 30 and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gellman et al., taken as cited above, in view of Wang et al. The references and rejection are incorporated as cited in a previous Office action.

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Wang et al. is cited as teaching the general production of pet food pieces in the form of various shapes. According to the reference, the cross section shape may be formed into that of "a star, an oval", etc. (mid col. 4; col. 9, lines 19-22).

Thus it would have been obvious to one of ordinary skill in the art to have provided the pet food product of Gellman et al. in any of several known common shapes, for purposes of marketing and sales. The formation of pet food pieces into common shapes was well known and performed in the art, as taught by Wang et al. The simple selection of a particular shape would not have involved an inventive step, given the specific teachings of Wang et al., and would not impart a patentable feature, *per se*, to the claimed invention.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

i) Claims 1-5, 7-11, 13-20 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-24 of copending Application No. 09/154,646.

ii) Claims 1-5, 7-11, 13-20 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-32 of copending Application No. 10/052,949.

iii) Claims 1-5, 7-11, 13-20 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-33 of copending Application No. 10/037,941

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Although the conflicting claims are not identical, they are not patentably distinct from each other because they are both directed to pet food chew products (and methods of use) of various sizes, with the same density properties and overlapping ingredients of denatured proteins and starches, insoluble fibers, etc.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Conclusion

Claims 6 and 12 have been canceled. Claim 26 is free of the prior art of record.

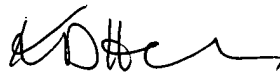
Applicant's amendment (switching the claims to specifically require the presence of a humectant) necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keith Hendricks whose telephone number is (571) 272-1401. The examiner can normally be reached on M-F (8:30am-6pm); First Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


KEITH HENDRICKS
PRIMARY EXAMINER